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SUPREME COURT, U.S.

No. 98-505

In the Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD H. MATHEWS, *Petitioner*,

v.

SEARS PENSION PLAN AND SEARS, ROEBUCK AND CO., *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM A. GORDON
Counsel of Record
GARY A. ISAAC
CHARLES F. REGAN, JR.
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Respondents

43 pp

QUESTIONS PRESENTED

1. Was the Seventh Circuit correct in upholding the Plan Administrator's interpretation of Section 7.8 of the Sears Pension Plan, as it existed between 1987 and 1994, in light of the undisputed, objective evidence, including (a) the contemporaneous interpretation in Treasury Department Regulations of an Internal Revenue Code provision which was adopted verbatim in Section 7.8 of the Plan, (b) a uniform course of dealing followed by all parties during the relevant period, and (c) an unbroken record of disclosure in Plan summaries distributed to participants?

2. Was the Seventh Circuit correct in holding, in accord with the nine other circuits that have addressed the issue, that a disappointed recipient of pension benefits is not entitled to a jury trial of his claim for additional benefits brought under Section 502(a)(1)(B) of ERISA, when his claim is dependent upon an interpretation of pension plan language, particularly where the Plan Administrator has been expressly granted discretion to interpret the Plan and remedy ambiguities in it?

RULE 29.6 STATEMENT

Sears Pension Plan, the first Respondent, does not have a parent corporation or any subsidiaries.

The second Respondent, whose correct name is Sears, Roebuck and Co., has no parent corporation. Its non-wholly owned subsidiaries are as follows:

713949 Ontario Limited (Canada)
Carrefour Richelieu Realties Ltd. (Canada)
Carrefour Richelieu Realties
(Carrefour Angrignon) Ltd. (Canada)
Carrefour Richelieu Realties
(Drummondville) Ltd. (Canada)
Carrefour Richelieu Realties
(Pierre Caisse) Ltd. (Canada)
Carrefour Richelieu Realties
(Place Angrignon) Ltd. (Canada)
Carrefour Richelieu Realties
(Sorel) Ltd. (Canada)
Carrefour Richelieu Realties
(St. Jean) Ltd. (Canada)
Carrefour Richelieu Realties
(St. Jerome) Ltd. (Canada)
Chatham Centre Mall Limited (Canada)
Harold Williams (1964) Limited (Canada)
Heritage Place Shopping Centre Limited (Canada)
Kelfor Holdings Limited (Canada)
Kildonan Place Shopping Centres Limited (Canada)
La Grande Place Des Bois - Francs Inc. (Canada)
Les Galeries de Hull Ltd. (Canada)
Les Rivieres Shopping Centre Ltd. (Canada)
MESBIC Ventures Holding Company
Mimtex (Colombia)
Mintoy (Colombia)
Place Beauport Properties Ltd. (Canada)

Place Vertu Properties Ltd. (Canada)
Sears, Roebuck de Mexico, S.A. de C.V. (Mexico)
Wilshire Landmark I

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Sears Pension Plan and Sears, Roebuck and Co. (collectively "Sears"), respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the unanimous judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Memorandum Opinion and Order of the district court, granting summary judgment for Sears, is reported at 1997 U.S. Dist. LEXIS 9892 (N.D. Ill. July 7, 1997), and is reprinted in the Appendix to the Petition ("Pet. App.") at Pet. App. 17. The May 13, 1998, Opinion of the Seventh Circuit, affirming the judgment of the district court, is reported at 144 F.3d 461, and is reprinted at Pet. App. 1. The June 26, 1998, Order denying Petitioner's request for rehearing and suggestion for rehearing *en banc* is unreported and is reprinted at Pet. App. 27.

STATEMENT

This case presents a fact-driven question of ERISA plan interpretation, and is thus particularly ill-suited for review by this Court. All that is at issue is the meaning of specific language in one section of one plan in light of the factual circumstances surrounding its adoption and implementation. That is, the courts below were asked to determine whether the language of Section 7.8 of the Sears Pension Plan ("the Plan"), as it existed between 1987 and 1994, required Sears to use the Pension Benefit Guaranty Corporation ("PBGC") discount interest rate in effect during the month that a lump sum pension payment was calculated, or whether that language, when read in context, permitted Sears to use the interest rate established by the PBGC on January 1 of each relevant year. After detailed review of the undisputed

objective evidence, both the district court and the Seventh Circuit approved Sears' interpretation.

A. Background Facts.

In 1984, Congress required for the first time, in Section 417(e)(3) of the Internal Revenue Code, that pension plans covered by ERISA use interest rates published by the PBGC when calculating lump sum payouts. Pet. App. 3. Specifically, Section 417(e)(3) provided that to calculate lump sums, a plan was to use

> "the interest rate which would be used (as of the date of the distribution) by the [PBGC] for purposes of determining the present value of a lump sum distribution on plan termination."

The following year, the Treasury Department issued a Regulation which specifically interpreted the new Section 417(e)(3) as authorizing plans to utilize *either* of two alternative PBGC rates when calculating lump sum payouts: that in effect on the first day of the plan year in which payment was to be made (the "January 1" rate), *or* that effective during the month of the payout (the "monthly" rate). Treas. Reg. § 1.417(e)-1T(b)(2)(ii), § 1.417(e)-1T(e)(1); Pet. App. 3; Respondents' Appendix ("Resp. App.") 1a.

In response to this regulatory interpretation, Sears amended its Plan, effective January 1, 1987, by adopting the language of Section 417(e)(3) word-for-word in Plan Section 7.8. Pet. App. 4; Resp. App. 3a. Thereafter, without interruption or exception, Sears used the permitted January 1 rate for eight years when calculating lump sum payments. Pet. App. 4. As the Seventh Circuit noted, there is no suggestion that Sears chose the January 1 rate "to reduce the retirement benefits paid out under the Plan." *Id.* at 3. Rather, by "adher[ing] steadily" to the January 1 rate when

making lump sum payments (*id.* at 16), Sears actually paid out approximately $52 million *more* to retirees than it would have if the monthly rate had been used. *Id.* at 15, 16, 19.

Moreover, throughout this same period, the Plan consistently and without deviation advised participants, in the summary plan documents distributed to all employees, that it was using the January 1 PBGC rate to calculate lump sums. Pet. App. 4, 11. No one who retired during the relevant period complained about the use of the January 1 rate. *Ibid.*

Both the Plan language at issue, and that portion of Section 417(e)(3) of the Code upon which it was based, were amended for plan years after 1994. Neither remains in effect. See 26 U.S.C.A. § 417, Historical and Statutory Notes (West Supp. 1997).

B. The District Court Decision.

In early 1995, Petitioner Edward Mathews brought suit to recover the difference between the lump sum he received in 1991 and the amount he would have been paid if the monthly PBGC interest rate had been used to calculate his payout. Pet. App. 17. Because a higher interest rate results in a lower lump sum, and rates happened to decline during 1991, Mr. Mathews was given a $403,446 lump sum, rather than the $420,771 payout he would have received if the monthly rate had been used. *Id.* at 18-19.

Thereafter, on Petitioner's motion, the district court certified a class consisting of all Sears retirees who, in the period embraced by the Complaint — from January 1, 1987, through December 31, 1994 — would have received a larger lump sum payment had the monthly interest rate been used instead of the January 1 rate. Excluded from the class were those retirees who benefitted from the Plan's use of the

January 1 rate, that is, those who retired when the monthly rate happened to be higher than the January 1 rate.

With the sole question being the interpretation of Plan language, and there being no serious dispute as to the facts (Pet. App. 18), the parties submitted the matter to the court by filing cross-motions for summary judgment.

The district court first reviewed what it considered the uncontested "objective evidence," including, *inter alia*, (i) the contemporaneous interpretation by the Treasury Department of Section 417(e)(3) of the Internal Revenue Code, which was adopted verbatim in Section 7.8 of the Plan (Pet. App. 25), (ii) Sears' consistent and uninterrupted use of the January 1 interest rate (*id.* at 23), and (iii) the Plan summaries which uniformly identified use of the January 1 rate, and were distributed annually to employees. *Ibid.* Based on that evidence, the district court held that Section 7.8, like the statute it parroted, authorized use of the January 1 rate (*id.* at 24), and granted summary judgment for Sears. That is, because the Plan Administrator had been given "sole discretion" to construe the terms of the Plan and to "remedy ambiguities" in it (Resp. App. 5a), the court held that Sears' decision to use the January 1 PBGC rate was neither arbitrary nor capricious — the standard of review when Plan language grants discretion to the administrator — and would "not be second-guessed by the Court." Pet. App. 25, 26.

C. The Seventh Circuit Decision.

On appeal, the Seventh Circuit affirmed. In so doing, Chief Judge Posner, writing for a unanimous court, undertook a careful review of the Plan language at issue. And, like the district court, the Seventh Circuit concluded that that language, properly understood in light of the objective and undisputed extrinsic evidence, could appropriately be read to permit use of the January 1 PBGC interest rate.

First, and foremost, the court of appeals looked to the "identity of language between the statute [Section 417(e)(3)] and the plan," together with the Treasury Regulation which had interpreted that language to encompass *either* the January 1 or the monthly interest rate. Pet. App. 11. "This convergence of statutory and regulatory language with plan language," the court held, suggested that Section 7.8 had a "technical legal meaning different from its ordinary meaning." Thus, the court concluded, the statute, and the regulation interpreting it, should be used as a "specialized dictionary" to establish the objective meaning of identical language in the Plan. *Ibid.*

Then, the court of appeals "reinforced" this finding with other objective facts. For example, the court found an undisputed "course of dealing" from the fact that Sears "uniform[ly]" used the January 1 rate throughout the class period, and that "nobody complained during the period in which the critical language was in the plan." Pet. App. 11.

And, finally, the Seventh Circuit found that the written Plan summaries, which consistently advised all employees that the January 1 rate was being used, provided "a presumptively reliable guide to the contents of the plan itself." Pet. App. 12. In considering this final factor, the court did *not* address, much less resolve, a "conflict" between the terms of the Plan and the summary plan description. Rather, contrary to Petitioner's primary argument here, the court simply concluded that the summary plan description provided supplemental support for, and, indeed, *confirmed*, the conclusion that the Plan language itself, properly understood in the light of other objective extrinsic evidence, permitted use of the January 1 rate. In fact, the court went out of its way to note that the Plan summary "would be given controlling weight" if the *Petitioner* were relying on it to increase his benefits, thereby

clearly indicating that it was not being given such weight here. *Ibid.*

Nor did the court hold, as Petitioner suggests, that the Plan language need not be enforced "because" class members did not rely on it. See Pet. 6. Rather, in response to Petitioner's argument that an employee would not be aware of the Treasury Regulation defining the language adopted in the Plan, the court simply observed that such an employee would not have read the language in the first instance. Pet. App. 14.

Thus, in rejecting Petitioner's after-the-fact interpretation, the Seventh Circuit recognized that, for eight years, no one *intended* the language of Section 7.8 to require Sears to choose the monthly discount rate, and no one *understood* that Sears was doing so. Pet. App. 4.

D. Petitioner's Request for Rehearing.

In the wake of the Seventh Circuit's unanimous affirmance, Petitioner sought rehearing, with a suggestion of rehearing *en banc*. This time, Petitioner argued that the court's ruling was contrary to Seventh Circuit authority which, he contended, prohibited use of a summary plan description to override the plain meaning of a plan. In response, Sears noted that the Seventh Circuit panel here had not relied on summary plan documents to contradict or override terms in the Plan, but, rather, had merely cited them as extrinsic evidence "reinforcing" the court's interpretation of the Plan's language. Pet. App. 11, 12.

Second, Petitioner argued for the first time that he had been deprived of his right to a jury trial. In advancing this position, Petitioner ignored the fact that all ten circuit courts of appeals to have addressed the issue have uniformly concluded that suits for pension benefits by disappointed applicants are inherently equitable. Moreover, the Petitioner

failed to address the circuit court decisions recognizing that jury trials are incompatible with the arbitrary and capricious standard applicable to plan administrators, who, as here, have been granted discretionary authority to interpret plans and remedy ambiguities.

On June 26, 1998, the Petition for Rehearing was denied. All of the judges on the original panel voted to deny, and none of the active judges on the Seventh Circuit requested a vote on the suggestion for rehearing *en banc*. Pet. App. 27.

REASONS FOR DENYING THE PETITION

Petitioner offers two arguments why this Court should review the Seventh Circuit's unanimous decision in favor of Sears in this case. Neither stands up to scrutiny.

First, Petitioner argues that the Court should grant certiorari to resolve "confusion" among the circuits as to whether a plan document or a summary plan description ("SPD") controls when the two conflict. But that issue is not presented by this case. The Seventh Circuit did not even find such a "conflict" between the Sears Plan and the summary plan documents, much less hold that Sears is entitled to summary judgment because the SPD "controls." Rather, the Seventh Circuit held that the undisputed and objective extrinsic evidence — particularly the Treasury Regulations interpreting the Internal Revenue Code provision tracked verbatim by Section 7.8 of the Plan — demonstrated that the Plan *itself* permitted use of the January 1 interest rate when calculating lump sum payouts. The court cited the undisputed fact that the written Plan summaries consistently advised Sears' employees that the January 1 rate was being used as one of several *additional* items of objective evidence that "reinforced" this interpretation of Section 7.8. Thus, even if the circuits were divided about whether a plan document or a summary plan description "controls" in the

event of a conflict, there is no basis whatsoever for a grant of certiorari in this particular case.

Second, Petitioner argues that the Court should grant certiorari because the Seventh Circuit's decision deprived him of a jury trial. However, the Seventh Circuit's conclusion that Petitioner was not entitled to a jury trial in this case is not in conflict with any decisions of this Court or with the law in any other circuit. Indeed, ten circuits have now addressed this issue, and all ten have held that no right to jury trial exists for benefits claims under Section 502(a)(1)(B) of ERISA. The courts of appeals have repeatedly held that even where an ERISA plaintiff casts his claim as one for breach of contract for money damages, cases brought under Section 502(a)(1)(B) are inherently equitable, both in nature and with respect to the remedy sought, when the claim is dependent upon an interpretation of pension plan language. Moreover, a jury trial is particularly inappropriate where, as here, the Plan Administrator's interpretation is subject to an "arbitrary and capricious" standard of review because the Administrator has been granted discretion to construe the plan.

I. THE SEVENTH CIRCUIT'S CONSIDERATION OF OBJECTIVE EXTRINSIC EVIDENCE TO INTERPRET SECTION 7.8 OF THE SEARS PLAN DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR THE LAW IN ANY OTHER CIRCUIT.

As noted above, this lawsuit arises out of a dispute over the meaning of Section 7.8 of the Sears Plan, *i.e.*, whether it required use of the monthly PBGC discount rate to calculate lump sum payments or authorized the Plan Administrator to use the January 1 PBGC rate instead. Section 7.8 of the Plan was taken verbatim from Section 417(e)(3) of the Internal Revenue Code, which provided

"that the applicable rate [would be] the PBGC rate that would be used 'as of the date of distribution,'" Pet. App. 2, but which had been interpreted in Regulations promulgated by the Treasury Department to permit either the monthly or the January 1 rate, *id.* at 3-4. After adopting the Plan language at issue, Sears during the class period "without interruption or exception * * * use[d] the January 1 PBGC rate in calculating the lump sum payouts," and, moreover, "clearly described" its use of the January 1 rate "in the summary plan documents furnished to all employees throughout the period." *Id.* at 4. Under these circumstances, the district court held, and the Seventh Circuit affirmed, that Section 7.8 of the Plan authorized Sears to use the January 1 rate. Petitioner's zeal to find an issue worthy of certiorari notwithstanding, the courts' interpretation of Section 7.8 does not raise any conflict with decisions of this Court or with the law of any other circuit.

A. Neither The Seventh Circuit Nor The District Court Found Any Conflict Between Section 7.8 Of The Sears Plan And The Summary Plan Documents.

Petitioner argues first that this Court should grant certiorari to resolve "confusion" among the circuits on "the issue of whether the plan document or an SPD controls when the two are in conflict." Pet. 7. The fundamental flaw in Petitioner's argument, however, is that that issue is simply not presented by this case, because there is no such "conflict" here, and the question of "control" never arose.

Petitioner would have this Court believe that the courts below recognized that the Sears Plan and the Sears SPD required *different* discount rates, but held nevertheless that Sears is entitled to summary judgment because the discount rate described in the SPD trumps the rate in the Plan. See, *e.g.*, Pet. 5 (describing the Seventh Circuit's decision as

holding "that Sears' use of the January 1 rate *set forth in the SPD* did not violate ERISA") (emphasis added); *id.* at 4 (describing the district court's decision as holding "that Sears' use of *the SPD discount rate* did not violate the Plan") (emphasis added). But this is revisionist history. Sears never argued, and the courts below never held, that Sears is entitled to summary judgment because the SPD "controls" in the event of a conflict with the Plan. In fact, it is clear from their decisions that neither the Seventh Circuit nor the district court found any such conflict at all. What the Seventh Circuit actually held is that it was permissible to consider "objective" extrinsic evidence in interpreting Section 7.8 of the Plan, Pet. App. 8-9, and that the "objective" evidence here established that Section 7.8 of the Plan *itself* permitted use of the January 1 rate.

The principal "objective" evidence considered by the Seventh Circuit was "the identity of language between the statute and the plan, together with the Treasury regulation that defines the statutory term 'as of the date of the distribution' to mean (at the election of the pension plan) *either* on the actual date of distribution (that is, the date of payment of the lump sum to the retiring worker) *or* on January 1 of the plan year in which the distribution occurs." Pet. App. 11 (emphasis added). "This convergence of statutory and regulatory language with plan language," the court held,

> "suggests that *'date of distribution' as used in the plan is a term of art*, that is, a term that has a technical legal meaning different from its ordinary meaning — a technical legal meaning *that in this case encompasses the use of the January 1 rate.*"

Ibid. (emphasis added and citation omitted). Thus, as Chief Judge Posner explained, "[t]he statute and regulation are here being used as a kind of specialized dictionary to establish"

that the Sears Plan had "an objective meaning different from that in ordinary language," and in fact permitted use of the January 1 rate. *Ibid.*

As for the SPD, the court of appeals simply cited that document as one of several additional items of "perfectly objective" evidence — along with the fact that "use of [the January 1] rate was Sears' uniform practice, and that nobody complained during the period in which the critical language was in the plan" — that "*reinforc*[*ed*]" the conclusion that Section 7.8 of the Plan permitted use of the January 1 rate. *Ibid.* (emphasis added). It is abundantly clear that the court of appeals viewed the SPD not as being in conflict with the Plan, but as "a presumptively reliable guide *to the contents of the plan itself.*" *Id.* at 12 (emphasis added).[1]

For that reason, the cases cited by Petitioner to demonstrate an inter-circuit conflict are simply inapposite. As Petitioner's own discussion (*id.* at 8-9) reflects, those cases involved a direct contradiction between the particular plan and the summary plan documents at issue, with the courts in each case holding that one or the other "controls." *E.g.*, *Glocker* v. *W.R. Grace & Co.*, 974 F.2d 540, 542 (4th Cir. 1992) (noting that plan handbook stated that availability of private-duty nursing was "'subject to the approval of AEtna'" while "[t]he Plan in contrast does not require that private-duty nursing care be subject to the approval of AEtna in order to be covered"); *Marolt* v. *Alliance Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998) (noting that issue was whether plaintiff was entitled to "bridge" a break in

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[1] The district court likewise held that Sears had adduced sufficient objective evidence to show that Section 7.8 of the *Plan*, like the statute that it "parroted," permitted the Plan Administrator to use either the monthly rate or the January 1 rate in calculating lump sum payouts. Pet. App. 23-25.

service to increase benefits, and that "[o]n that subject, the SPD recites a number of criteria that clearly and unambiguously entitle Marolt to bridge her break in service," while "[j]ust as clearly, the Distribution Agreement [incorporated as part of the ERISA plan] rules out bridging for Marolt"). Here, in contrast, the Seventh Circuit made clear that it was *not* giving the summary plan documents "controlling weight," but, rather, that it considered the summary documents only as objective evidence that corroborated its interpretation of the Plan language at issue.[2/] The Petitioner does not cite a single court of appeals decision that is in conflict with this confirmatory use of the summary documents.

In short, the Seventh Circuit did not even find the Plan-SPD "conflict" posited by Petitioner, much less hold that the summary documents "control." Accordingly, even if there were "confusion" among the circuits about whether a plan document or a summary plan description "controls" in the event of a conflict, there is no basis whatsoever for the grant of certiorari in *this* case.

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[2] That the court of appeals did not affirm summary judgment on the ground that the Sears summary plan documents contradict, and take precedence over, Section 7.8 is underscored by its *dictum* that the summary documents "would be given controlling weight" only "if the shoe were on the other foot and the *plaintiff* were trying to use the summary as a more generous measure of his benefits than the plan and could show that he had reasonably relied on language in the summary that was inconsistent with the language of the plan." Pet. App. 12 (emphasis added).

B. The Seventh Circuit's Application Of Federal Common Law Principles To Interpret Section 7.8 Of The Sears Plan Was Entirely Consistent With Prior Decisions Of This Court And Of Other Circuits.

Petitioner also appears to argue that the Seventh Circuit's application of federal common law principles to interpret the Sears Plan was somehow improper and in conflict with the decisions of other circuits. Pet. 10-12. This argument should be rejected for several reasons.

First, Petitioner is in no position to complain now of the Seventh Circuit's resort to federal common law to interpret the Plan, for as Chief Judge Posner recognized in his Opinion, Petitioner "*agree*[*d*] that the ordinary principles of contract interpretation govern the interpretation of pension plans covered by ERISA." Pet. App. 5 (emphasis added).

Second, and more importantly, the Seventh Circuit's decision is entirely consistent with this Court's longstanding recognition that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987)). Accord, *e.g.*, *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) ("a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans"). The Seventh Circuit in this case did just that, making clear that "the relevant principles of contract interpretation" to be applied here "are not those of any particular state's contract law, but rather are a body of federal common law *tailored to the policies of ERISA*." Pet. App. 5 (emphasis added). Accord *ibid.* ("when a case involves ERISA pension plans rather than ERISA welfare plans, the interpretive principles

are also to be tailored to the distinctive characteristics of pension plans").

Third, in concluding that Section 7.8 of the Sears Plan permitted use of the January 1 rate, the Seventh Circuit relied not only upon its own prior rulings, but upon decisions of the First, Third, Eighth, and Ninth Circuits. Pet. App. 8 (citing *Bolton* v. *Construction Laborers' Pension Trust*, 56 F.3d 1055, 1059 n.2 (9th Cir. 1995); *Landro* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1352 (8th Cir. 1980)); *id.* at 11-12 (citing *In re New Valley Corp.*, 89 F.3d 143, 149-50 (3d Cir. 1996); *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995)). Moreover, the Seventh Circuit did not express disagreement with a *single decision* from another jurisdiction. Pet. App. 5-12.[3] And there is not the slightest basis in decisions from other circuits to conclude that another circuit would have decided *this* case differently.

Indeed, the Sixth and Ninth Circuit decisions cited by Petitioner (Pet. 10) actually underscore the absence of any conflict. In *Cinelli* v. *Security Pacific Corp.*, 61 F.3d 1437, 1444 (9th Cir. 1995), for example, the Ninth Circuit noted "that ERISA generally preempts common law theories of contract law," but expressly recognized (*id.* at 1444-45) that courts "have allowed exceptions where the application of general contract principles is not inconsistent with the purposes of ERISA." Moreover, citing the *Seventh Circuit's* decision in *Miller* v. *Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994), the *Cinelli* court specifically identified as one of those "exceptions" the common law doctrine of "latent" or

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[3] Indeed, if the Seventh Circuit panel had perceived a conflict with other circuits, it would have been required under Seventh Circuit Rule 40(e) to circulate its proposed opinion among the active members of the court. That did not occur here.

extrinsic ambiguity, the very doctrine upon which the Seventh Circuit relied in this case. *See* Pet. App. 7-10.

Petitioner also cites *Health Cost Controls* v. *Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997), for the proposition that "the Sixth Circuit has rejected the notion that 'federal courts [may] apply common law theories to alter the express terms of written benefit plans.'" Pet. 10. But one of the cases that the Sixth Circuit cited as authority on that score was the Ninth Circuit's decision in *Cinelli*, which, as shown above, recognized an "exception" for the latent or extrinsic ambiguity doctrine applied by the Seventh Circuit here. Moreover, the Sixth Circuit in *Isbell* made clear that "Congress intended that the judiciary *would* develop and apply federal common law for ERISA claims," and that "[f]ederal common law * * * fills the gaps of ERISA *to assist in the interpretation of ERISA plans*." 139 F.3d at 1072 (emphasis added). In any event, *Isbell* did not present any question of plan interpretation; rather, the issue there was whether common law equitable doctrines such as unjust enrichment could be applied to *override* plan terms whose meaning was not in dispute. *Ibid.* Here, of course, the Seventh Circuit used federal common law principles not to "alter" the Sears Plan, but "to assist in [its] interpretation." *Ibid.*

Finally, Petitioner argues that the Seventh Circuit "held that [Petitioner] could not recover under the terms of the Plan *because he failed to demonstrate reliance* on [its] terms," and that that purported holding "conflicts with the Tenth Circuit's holding in *Pratt* v. *Petroleum Product Management Employee Savings Plan*, 920 F.2d 651, 662 (10th Cir. 1990)." Pet. 10-11. But this is yet another

distortion of what the Seventh Circuit decided.[4] The court never stated that plan terms are enforceable only if the participant can establish reliance, as Petitioner suggests. Rather, the observation on which Petitioner seizes was made by the court in response to his *own* argument that reliance upon the Treasury Regulations interpreting Section 417(e)(3) of the Internal Revenue Code was unfair because Plan participants were unlikely to have been "actually aware of the Treasury regulation." The Seventh Circuit simply noted that neither plaintiff "[n]or any other member of the class actually relied on the language of the *plan*" either. Pet. App. 14 (emphasis added).

II. THE SEVENTH CIRCUIT'S TREATMENT OF THE JURY TRIAL ISSUE DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR THE LAW IN ANY OTHER CIRCUIT.

A. All Ten Circuits To Have Addressed The Issue Have Agreed That No Right To Jury Trial Exists For Benefits Claims Under Section 502(a)(1)(B) Of ERISA.

Petitioner also argues that this Court should grant certiorari because the Seventh Circuit's conclusion that there is no right to trial by jury on a benefits claim under Section

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[4] *Pratt* is readily distinguishable in any event. As the Petition itself shows, all the Tenth Circuit said in that case was that it would "'not require detrimental reliance before enforcing actual, express contractual provisions *that admit only of a single interpretation.*'" Pet. 11 (quoting *Pratt*, 920 F.2d at 662) (emphasis added). But, as discussed *infra* at 21-22, in *this* case, the Seventh Circuit held that the Plan provision at issue — like the statutory section from which it was lifted word-for-word — was *ambiguous*, *i.e.*, that it permitted use of either the January 1 rate or the monthly PBGC rate to calculate lump sum payments.

502(a)(1)(B) of ERISA (29 U.S.C. § 1132(a)(1)(B)) is somehow contrary to this Court's decisions in *Tull* v. *United States*, 481 U.S. 412 (1987), *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), and *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558 (1990). Pet. 13. This argument is meritless.

To begin, the Seventh Circuit was hardly alone in concluding that there is no right to jury trial here. As the Second Circuit recently observed, "*every* other federal circuit to have addressed this question ha[s] ruled that there was no such right to jury trial" in an action "for ERISA plan benefits under § 502(a)(1)(B) of ERISA." *DeFelice* v. *American Int'l Life Assurance Co.*, 112 F.3d 61, 64 & n.2 (2d Cir. 1997) (emphasis added).

Indeed, with the Tenth Circuit's decision earlier this year in *Adams* v. *Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), ten courts of appeals have now held that no right to jury trial exists where, as here, a plaintiff asserts a right to benefits under Section 502(a)(1)(B) of ERISA. *E.g.*, *id.* at 1162 ("the Seventh Amendment provides no right to a jury trial" in actions to recover monetary benefits under 29 U.S.C. § 1132(a)(1)(B)); *Hunt* v. *Hawthorne Associates, Inc.*, 119 F.3d 888, 907-08 (11th Cir. 1997) ("participants suing under section 502(a)(1)(B) are not entitled to a jury trial"); *Sullivan* v. *LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1258 (2d Cir. 1996) ("this Court now joins its sister circuits and decides that there is no right to a jury trial in a suit brought to recover ERISA benefits"); *Cox* v. *Keystone Carbon Co.*, 894 F.2d 647, 649 (3d Cir. 1990) ("employees who sued under ERISA to receive benefits under an

applicable plan were not entitled to a jury trial under section 502(a)(1)(B)").[5]

Petitioner completely ignores these cases — and the fact that almost all of the courts of appeals that have adopted or reaffirmed the rule that there is no right to a jury trial in ERISA benefits cases have done so in opinions issued *after* this Court's decisions in *Tull*, *Granfinanciera*, and *Terry*. Thus, in determining whether a right to jury trial exists, the courts of appeals have assessed "the nature of the action," *Tull*, 481 U.S. at 417, and have uniformly held that "cases involving ERISA benefits are inherently equitable in nature, not contractual." *DeFelice*, 112 F.3d at 64 (rejecting plaintiff's contention that her claim for ERISA benefits "is

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[5] *See also Wilkins* v. *Baptist Healthcare System*, 150 F.3d 609, 616 (6th Cir. 1998) (holding that "the district court properly denied his motion for a jury trial" in an "appeal * * * from the denial of benefits"); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323-24 (5th Cir. 1994) (holding that "plaintiffs were not entitled to a jury trial" in action for recovery of surplus assets of predecessor-defined benefit plan); *Spinelli* v. *Gaughan*, 12 F.3d 853, 855-58 (9th Cir. 1993) (reaffirming, in light of *Terry*, *Granfinanciera*, and *Tull*, that there is no right to jury trial under ERISA); *Turner* v. *CF&I Steel Corp.*, 770 F.2d 43, 47 (3d Cir. 1985) ("no jury trial is required in suits under § 502(a)(1)(B) by a beneficiary or participant against a trustee"); *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985) ("proceedings to determine rights under employee benefit plans are equitable in character and thus a matter for a judge, not a jury"); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984) (holding that there is no "independent constitutional or statutory right to jury trial in ERISA actions"); *Bugher* v. *Feightner*, 722 F.2d 1356, 1360 (7th Cir. 1983) (reaffirming that there is "no right to a jury trial in an action brought by a beneficiary under 29 U.S.C. § 1132(a)(1)(B)"); *In re Vorpahl*, 695 F.2d 318, 322 (8th Cir. 1982) (holding that "a jury trial is not required under section 502 [of ERISA]").

more properly characterized as a legal claim for breach of contract, with the relief of money damages, and that she therefore has an absolute right to trial by jury under the Seventh Amendment"). *See also, e.g., Cox*, 894 F.2d at 649 ("a section 502(a)(1)(B) claim for benefits [is] equitable in nature, and * * * hence plaintiff [is] not entitled to a jury trial"). The courts of appeals also have consistently characterized the "remedy sought," *Tull*, 481 U.S. at 417, as equitable where, as here, the plaintiff's entitlement to the claimed ERISA benefits hinged on an issue of Plan interpretation. *E.g., Adams*, 149 F.3d at 1162 (holding that the remedy sought is equitable when "the resolution of [plaintiffs'] claims for monetary relief turns on a determination of their eligibility under the plan"); *Hunt*, 119 F.3d at 907-08 (holding that plaintiff's "only" claim in an action under section 502(a)(1)(B) of ERISA was for "equitable relief").

Moreover, while the courts of appeals have treated *all* claims under Section 502(a)(1)(B) of ERISA as equitable, both in nature and with regard to the scope of available remedies, this characterization is particularly apt where, as here, the "benefit plan gives the administrator * * * authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115. The courts of appeals have found "the presumption of correctness that attaches to private administrative action" in these circumstances to be "incompatible with a jury trial scheme." *Sullivan*, 82 F.3d at 1258. Accord, *e.g., Wardle* v. *Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 830 (7th Cir. 1980) ("the limited scope of review bespeaks a legislative scheme granting initial discretionary decisionmaking to bodies other than the federal courts, with which federal jury trials have proved incompatible"). The Sears Plan expressly authorizes the Plan Administrator "[t]o conclusively determine, *in his sole discretion*, all questions

arising under the Plan, including the power to determine the rights and eligibility of employees, participants, contingent annuitants and other persons, and the *amounts of their retirement incomes or other benefits* under the Plan and *to remedy ambiguities*, inconsistencies or omissions." Resp. App. 5a (emphasis added). This Plan language plainly gives rise to an "arbitrary and capricious" standard of review, *Firestone*, 489 U.S. at 115, which "has traditionally been done by judges." *Wardle*, 627 F.2d at 830; *see* Pet. App. 25.

In sum, then, the Seventh Circuit's denial of a jury trial in this action for ERISA benefits is fully consistent with the unanimous approach of every court of appeals to have faced the issue and with this Court's decisions in *Tull*, *Granfinanciera*, and *Terry*.

B. Petitioner's Seventh Amendment Argument Rests On Mischaracterizations Of The Facts And Law.

Petitioner fails to cite a single court of appeals case holding that a plaintiff asserting a claim for ERISA benefits under 29 U.S.C. § 1132(a)(1)(B) is entitled to a jury trial. In lieu of such authority, Petitioner tries to transform his ERISA benefits claim into one for the immediate and unconditional payment of money damages for breach of contract, for which there may be a right to a jury trial. This argument, however, relies on three deeply flawed premises.

First, Petitioner suggests, on the basis of two decisions of the Tenth Circuit, that this action is analogous to a breach of contract claim. Pet. 13-15. But those cases do not support Petitioner's contention; to the contrary, both Tenth Circuit decisions are fully consistent with the unanimous view of the courts of appeals that an action like this one is equitable, not legal, in nature. Second, Petitioner claims that the remedy he seeks is the immediate and unconditional payment of money damages. *Id.* at 15-16. This, too, is

wrong, as the courts of appeals have consistently held in cases requiring an interpretation of Plan language. And, third, Petitioner submits that "there is no eligibility issue (and hence no equitable issue)" in this case, *id.* at 16 — despite the fact that the entire case turned on whether, under the specific language of the Sears Plan, Petitioner was entitled to the additional benefits he claimed.

As demonstrated below, once these mischaracterizations of the relevant facts and law are exposed, there can be no question that the Seventh Circuit accurately stated and properly applied the unanimous rule of the courts of appeals in the circumstances presented here.

1. This Case Is Not Analogous To A Breach Of Contract Claim.

In an effort to evade the unanimous holdings of the courts of appeals, Petitioner attempts to recast his claim for ERISA benefits as one for breach of contract. Pet. 13-15. However, the only cases on which he relies actually undermine his cause.

Petitioner begins his discussion by acknowledging that earlier this year, in *Adams* v. *Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), the Tenth Circuit joined all of its sister circuits in holding that ERISA benefits actions are "equitable in nature." Pet. 14 (citing *Adams*, 149 F.3d at 1161). However, Petitioner then contrasts *Adams* with an earlier Tenth Circuit decision, *Pratt* v. *Petroleum Production Management, Inc. Employee Savings Plan & Trust*, 920 F.2d 651 (10th Cir. 1990), which he claims "has described the nature of the issue here as a breach of contract" — a "legal" claim for which a jury trial is available. Pet. 13. Finally, Petitioner contends that this case is like *Pratt*, not *Adams*. But even a cursory examination of those two cases demonstrates that this is not so. Indeed, precisely the opposite is true.

Most significantly, the *Pratt* court did not even hint, much less hold, that the plaintiff had a right to a jury trial in that case. As the Tenth Circuit explained in *Adams*, the court in *Pratt* never "addressed the jury trial issue or the broader issue of whether an ERISA § 1132(a)(1)(B) action is best characterized as legal or equitable." 149 F.3d at 1160.

Moreover, *Pratt* is factually inapposite. As Petitioner recognizes, *Pratt* "involved the application of an *unambiguous* valuation procedure." Pet. 14 (emphasis added) (citing *Adams*, 149 F.3d at 1160). Thus, as the Tenth Circuit explained, "[a]n action by recognized beneficiaries to enforce the *unambiguous* terms of a plan," such as *Pratt*, "is more readily characterized as a breach of contract action than the more general eligibility claim raised" in *Adams*. 149 F.3d at 1160 (emphasis added). But this case is entirely different from *Pratt* — and, in fact, is much like *Adams*, in which "the central issue * * * involve[d] an eligibility determination based upon the interpretation of terms left undefined in the plan." *Id.* After analyzing the particular facts presented here, the Seventh Circuit found that the Sears Plan — like the federal statute on which it was based — was *ambiguous*, that is, it permitted the Plan Administrator to use either the January 1 or the monthly PBGC rate. Pet. App. 14. Similarly, the district court found that the evidence "demonstrate[s] that there was an extrinsic ambiguity in the contract," which the Plan Administrator had an obligation to interpret "reasonably." Pet. App. 25. Under these circumstances, *Pratt* provides no support whatever for Petitioner's contention that his claim is in some fashion analogous to a breach of contract (and hence legal in nature).

2. Petitioner's Suit Is Not An Action For "Money Damages," But Rather Is An Equitable Action For Benefits Under Section 502(a)(1)(B) of ERISA.

Petitioner's second gambit is to reformulate his suit for ERISA benefits as one for "unconditional and immediate" monetary relief. Pet. 16. This characterization fares no better than the breach of contract analogy, as the courts of appeals have consistently rejected efforts by Plan participants, like Petitioner here, to characterize the "remedy sought," *Tull*, 481 U.S. at 417, in their suits for ERISA benefits as "money damages." For example, in *Adams* — one of the principal cases cited by Petitioner — the Tenth Circuit explained as follows:

> "Plaintiffs would like us to believe they seek only money damages and thus fit squarely within the *Terry* holding. * * * What Plaintiffs overlook, however, is the fact they have no entitlement to the benefits unless and until a court exercises its equitable powers to declare Plaintiffs eligible beneficiaries of the plan and thus order Defendants, as fiduciaries, to pay benefits."

149 F.3d at 1161-62. Similarly, the Eleventh Circuit has held that

> "[t]he nature of an action under section 502(a)(1)(B) is for the enforcement of the ERISA plan. Although the plaintiffs assert that they are claiming money damages, in effect they are claiming the benefits they are allegedly entitled to under the plan."

Blake v. *Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th Cir. 1990).[6] See also *Hunt*, 119 F.3d at 907-08 ("hold[ing] that [plaintiff's] claim for legal relief (*i.e.*, a money judgment) under section 502(a)(1)(B) fails to state a claim * * *, leaving only his claim for equitable relief * * * to recover his lump-sum benefit").

Petitioner expressly brought his action under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), to recover the difference between the lump sum he received in 1991 and the amount he would have been paid had the lower monthly PBGC interest rate been used to calculate his payout. See Pet. C.A. App. 71, 73 (¶¶ 37, 44 of Petitioner's complaint). Despite the fact that Petitioner ultimately seeks the payment of money, he has no right to that money "unless and until" a court (or the Plan Administrator), performing the equitable act of construing the Plan language, resolves in his favor the threshold question of his entitlement to the claimed benefits. Furthermore, as pointed out above, the equitable character of this remedy is all the more apparent where, as here, the Plan Administrator had been given discretion to "remedy ambiguities." Resp. App. 5a. For all of these reasons, Petitioner's claim falls four-square within the scope of the cases cited above, and Petitioner cannot seriously contend that *any* court of appeals would treat his suit as anything other than an action for ERISA benefits for which no right to jury trial exists.

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[6] Similarly, the Cooke treatise, on which the Seventh Circuit relied (Pet. App. 8), after noting that cases precluding a jury trial under ERISA are "legion," concludes that jury trials are not available in "a suit for benefits" which, like this case, "involves an issue of interpretation of the plan." 2 Ronald J. Cooke, *ERISA Practice and Procedure* § 8.15, at 8-84 to 8-85 (2d ed. 1996).

Moreover, even if this case were governed not by ERISA, but by the Restatement (Second) of Trusts § 198 — as Petitioner suggests, Pet. 16 — the result is the same. The Illustrations accompanying that section make plain that a beneficiary has a right to a jury trial only if the trustee fails to perform a ministerial act which he has a clear obligation to do. Illustration 5, in particular, indicates that a beneficiary *cannot* maintain an action at law against the trustee where, as here, the claim hinges on the trustee's exercise of discretion. The Tenth Circuit reached the same conclusion in *Adams*, stating that it could "not see how Plaintiffs can claim they are unconditionally and immediately entitled to benefits under the * * * Plan when * * * the resolution of their claims for monetary relief turns on a determination of their eligibility under the plan." 149 F.3d at 1162. Thus, as the *Adams* court recognized, its holding that "[t]he remedy Plaintiffs' seek pursuant to 29 U.S.C. § 1132(a)(1)(B) is * * * equitable" was "consistent with the delineation of beneficiaries' remedies under trust law." *Ibid.* (citing Restatement (Second) of Trusts §§ 197-198 (1959)).

In short, Petitioner cites no case even remotely like this one — an action by a Plan participant under Section 502(a)(1)(B) of ERISA involving the interpretation of a particular, ambiguous Plan provision which the Plan Administrator had discretion to reasonably construe — in which a jury trial was granted on the basis of an immediate and unconditional duty on the part of the trustee to pay money damages.

3. This Case Plainly Involves An Eligibility Issue, And Thus Is Equitable.

Finally, Petitioner falls back on an unfounded contention that "there is no eligibility issue (and hence no equitable issue)" in this case. Pet. 16. Petitioner bases this argument on a purported dichotomy between ERISA "eligibility"

claims, for which a jury trial is unavailable, and claims requesting a calculation of ERISA lump sum benefits, for which Petitioner believes a jury trial is available. *Ibid.* However, this claimed dichotomy is wholly unsupported in the case law. To the contrary, the courts of appeals have treated *all* claims under Section 502(a)(1)(B) of ERISA — even those seeking a lump sum payment — as equitable for purposes of the Seventh Amendment right to jury trial. *E.g.*, *Hunt*, 119 F.3d at 907-08 (rejecting plaintiff's argument that he was entitled to a jury trial in his action to recover a lump sum pension under Section 502(a)(1)(B), and holding that plaintiff's "only" claim was "for equitable relief * * * to recover his lump-sum benefit"). The particular circumstances presented here simply confirm the wisdom of this approach. The sole question presented in the courts below was whether, under the particular language of the Sears Plan, Petitioner was *entitled to* the additional benefits he claimed; that is, whether Petitioner was *eligible for* such benefits. As Petitioner concedes, the circuits are "in accord * * * that questions of eligibility [for] ERISA benefits are equitable in nature." Pet. 14. This is simply another case in that mold, and thus offers absolutely no basis for a grant of certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

WILLIAM A. GORDON
Counsel of Record
GARY A. ISAAC
CHARLES F. REGAN, JR.
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Respondents

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